STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re:	)	**MPC 15-0203**	**MPC 110-0803**
	)	**MPC 208-1003**	**MPC 163-0803**
David S. Chase,	)	**MPC 148-0803**	**MPD 126-0803**
	)	**MPC 106-0803**	**MPC 209-1003**
Respondent.	)	**MPC 140-0803**	**MPC 89-0703**
	)	**MPC 122-0803**	**MPC 90-0703**
	)		**MPC 87-0703**

RENEWED MOTION TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES

Respondent, David S. Chase, M.D., through counsel, hereby moves the Medical Practice Board (the "Board") to dismiss the Superceding Specification of Charges with prejudice. In the alternative, he asks that the charges be dismissed without prejudice to the State's ability to re-file if Dr. Chase ever reapplies for a medical license. In support of his Motion, Respondent relies upon the following incorporated Memorandum of Law and the Exhibits attached hereto. Respondent requests a hearing on this Motion.

MEMORANDUM OF LAW

I. Introduction.

On July 21, 2003, this Board ended Dr. Chase's 35-year career when it summarily suspended his medical license. Eight months later, the Board reinstated Dr. Chase's license based on clear evidence that the Board's investigator had fabricated some of the most important evidence against him. Unfortunately, the Board's reversal came too late to save Dr. Chase's medical practice, which was permanently destroyed by the summary suspension and attendant publicity.

A few months after the summary suspension, the Board's prosecutor improperly discouraged witnesses from speaking with the Respondent and his counsel as they were preparing Dr. Chase's defense. Although the prosecutor's actions were brought to the Board's attention, the Board declined to decide whether they were unethical or unconstitutional. Since then, the Vermont Professional Responsibility Board, which regulates attorneys, has squarely held that precisely the type of conduct in which the Board's prosecutor engaged is not only unethical, but also violates the Rules of Civil Procedure and notions of fundamental fairness. The unambiguously improper conduct of the Board's lead investigator and its prosecutor has badly and irrevocably compromised the integrity of these proceedings.

Since the Board stayed this action, Dr. Chase has been acquitted by a jury of his peers on federal criminal charges that were factually identical to those that provide the basis for these proceedings. Indeed, they involved many of the very same patients. During the course of that three-month trial, the state and federal governments threw enormous resources behind the effort to convict Dr. Chase but were unsuccessful because the evidence supported Dr. Chase's innocence. Indeed, near the end of trial, the United States District Court found that the government had failed to disclose significant and material evidence of Dr. Chase's innocence, in violation of its constitutional obligations. That the jury exonerated Dr. Chase without hearing the suppressed evidence is itself a compelling demonstration of Dr. Chase's actual innocence. In light of the jury's verdict, federal authorities have completely abandoned their prosecution of Dr. Chase.

Dr. Chase's license to practice medicine expired during the pendency of the criminal case, and he has no current plans to reapply. Although the summary suspension was ultimately reversed, its results were permanent: Dr. Chase's practice was destroyed, and he will never

return to it. There is no additional action this Board can take that will further protect the public, either by disciplining Dr. Chase or by making him an example for other doctors.

Yet, the State insists on moving forward with this disciplinary proceeding, despite the fact that the proceeding has been irrevocably compromised by the investigator's illegal falsification of evidence; despite the fact that the Vermont Board of Professional Responsibility has ruled that the same sort of conduct in which the Board's prosecutor engaged violates ethical, statutory, and constitutional principles; despite the fact that the merits hearing will require at least 30 hearing days and needlessly consume this Board's valuable resources; despite the fact that the hearing will involve dozens of witnesses giving testimony on complicated medical and scientific subjects; despite the fact that the prosecution will cost the Vermont taxpayers hundreds of thousands of dollars; despite the fact that it will impose still further financial and personal burdens on Dr. Chase and his family; and despite the fact that a jury of Vermonters has already loudly rejected the very factual allegations the State continues to assert. The State nonetheless wishes to press forward with a prosecution that, regardless of the outcome, will have absolutely no practical effect, either on the safety of Vermonters or Dr. Chase's ability to practice medicine. There is nothing the Board can do to Dr. Chase that has not already been accomplished through the destruction of his practice and reputation by the summary suspension.

The Board has the authority and the responsibility to put an end to these badly flawed, wasteful, and ultimately pointless proceedings. It should dismiss the Superceding Specification of Charges with prejudice. In the alternative, it should dismiss the case without prejudice and allow the state to re-bring these charges if, and only if, Dr. Chase chooses to reapply for a medical license in the future.

II. Factual Background.

A. The State Moved To Summarily Suspend Dr. Chase's Medical License, Relying Primarily On The Affidavit Of Amy Landry.

On Sunday, July 20, 2003, the State of Vermont moved to summarily suspend Dr. Chase's license to practice medicine for allegedly recommending and performing cataract surgery that was not medically necessary. The State's Motion was predicated upon the purported allegations of three witnesses. First, the State cited the complaint of a former patient, identified as "Patient A," whom Dr. Chase had diagnosed with cataracts.[1] Second, the State relied upon the statement of Dr. Patrick Morhun,[2] a New Hampshire ophthalmologist, who disagreed with Dr. Chase's cataract diagnosis regarding Patient A. Third, and most importantly, the State relied upon the alleged sworn written statement of Amy Landry, one of Dr. Chase's former staff members, which alleged that Dr. Chase had purposefully falsified medical records to "force patients into cataract surgery." (Motion for Summary Suspension ("Motion") ¶ 20 (quoting Affidavit of Amy Landry ("Landry Aff."), attached hereto as Exhibit A, at 1).)

B. The State's Motion And Ms. Landry's Sworn Affidavit Contained Numerous Allegations Of Fraud On The Part Of Dr. Chase.

Ms. Landry's affidavit, and the Motion for Summary Suspension that relied upon it, contained numerous allegations that Dr. Chase had engaged in purposeful fraud. According to the State, Ms. Landry swore, among other things, that:

---

[1] Patient A had seen Dr. Chase on a single occasion for approximately 15 minutes and had ignored Dr. Chase's advice, documented in her medical chart, that she undergo a blood sugar test before a final decision regarding cataract surgery was made.

[2] Dr. Morhun examined patient A on a single occasion, during which he did not employ many of the important cataract diagnostic tools used by Dr. Chase. By his own admission, Dr. Morhun performs approximately three times as many cataract surgeries per year as Dr. Chase, while annually examining only a fraction of the number of patients seen by Dr. Chase in a given year. Dr. Morhun has admitted that he performs far less presurgical testing and evaluation than Dr. Chase. Unlike Dr. Chase, who performed no advertising for his practice, Dr. Morhun has conceded in sworn deposition and trial testimony that he has handed out his business cards at nursing homes in order to generate business and has arranged to have patients bused from those homes to his office for cataract exams.

(1) Dr. Chase had "crafted records to force patients into cataract surgery." (Motion ¶ 20; see also Landry Aff. at 1.)

(2) "the results of [patients' contrast sensitivity test ("CST") results] were recorded on post-it paper," (Motion ¶ 22), and "did not go in the chart." (Landry Aff. at 2.)

(3) Dr. Chase had a "script" in his exam room, (Motion ¶ 26; Landry Aff. at 2), and he gave his patients "the same spiel each time about cataracts." (Landry Aff. at 2; Motion ¶ 25.)

(4) Dr. Chase falsified the medical chart of Patient A, noting that the patient "wanted cataracts removed when she did not." (Landry Aff. at 4.)

Without Ms. Landry's accusations of purposeful fraud, the State's Motion would have alleged little more than a difference of opinion between ophthalmologists regarding a cataract diagnosis and appropriate treatment options. However, based on the strength of Ms. Landry's alleged statements, the State represented to the Board its belief that Dr. Chase had engaged in willful misrepresentation in treatments, willful falsification of reports or records, consistent improper utilization of services and non-accepted procedures, and immoral, unprofessional, or dishonest conduct, (Motion ¶ 34), and it requested the immediate and summary suspension of Dr. Chase's license to practice medicine. (Motion at 8.)

C. The Board Summarily Suspended Dr. Chase's License Based On Ms. Landry's Allegations Of Fraud Without Allowing Dr. Chase To Call Or Cross -Examine Witnesses.

The State served its Motion for Summary Suspension on Dr. Chase on the morning of July 21, 2003 and required that he appear for a hearing on that Motion at 1:00 the same afternoon. At the same time he provided Dr. Chase with notice of the hearing, the Board's Interim Director notified the news media of the hearing and invited them to attend.

At the summary suspension hearing, at which neither party was allowed to call or cross-examine witnesses, Dr. Chase denied the State's allegations but offered to voluntarily cease

recommending or performing cataract surgeries until the State and the Board had completed their investigations. (Transcript of July 21, 2003 Hearing ("Hearing Tr."), attached hereto as Exhibit B, at 16-18.) Explicitly relying on Ms. Landry's affidavit, the State rejected Dr. Chase's compromise offer, arguing that if Dr. Chase was "deliberately . . . fixing tests in order to . . . justify cataract surgery," he may be willing to put his patients "at risk in other situations as well." (Hearing Tr. at 21-22.) Despite Dr. Chase's argument that it would be impulsive and imprudent for the Board to effectively destroy his medical career and jeopardize his patients' continuity of care,[3] on the strength of the untested allegations contained in an affidavit by a single ex-employee, (*id.* at 16-17), the Board summarily suspended his license.

D. The Summary Suspension Was Widely Reported In The Vermont Media And Effectively Ended Dr. Chase's Practice.

Because the Interim Director had invited the news media to attend the hearing, the summary suspension of Dr. Chase's license was immediately and widely reported by the Vermont press. On July 22, 2003, the Burlington Free Press reported the summary suspension on its front page under a banner headline reading: "Eye doctor accused of needless surgery." (See 7/22/03 BFP, Page 1, attached hereto as Exhibit C). The story repeated, often verbatim, the State's unproven allegations of fraud on the part of Dr. Chase. The television news, too, prominently carried and repeated news of Dr. Chase's summary suspension. The suspension and resulting press coverage effectively ended Dr. Chase's 35-year career as an ophthalmologist, despite the fact that he had not been given an opportunity to rebut the charges against him and had voluntarily offered to stop performing cataract surgery while the Board investigated the unproven allegations against him.

---

[3] One of Dr. Chase's acute glaucoma patients testified at Dr. Chase's criminal trial that the precipitous summary suspension caused him to lose sight because none of the other doctors in the community whom he contacted would agree to see him soon enough after the suspension.

E. The State's Specification Of Charges And Superceding Specification Of Charges Reiterated The Allegations Contained In Ms. Landry's Affidavit.

On July 29, 2003, the State formally charged Dr. Chase with 180 counts of unprofessional conduct. On December 21, 2003, the State filed a Superceding Specification of Charges, expanding its case to allege 471 counts of unprofessional conduct by Dr. Chase with respect to 13 separate patients. As to these 13 patients, the state alleged that Dr. Chase engaged in fraudulent and unprofessional conduct by:

- Improperly administering contrast sensitivity testing ("CST") and brightness acuity testing ("BAT") in order to justify cataract surgery for his patients;
- Improperly relying upon CST and BAT testing, as opposed to more common Snellen vision testing, in order to justify cataract surgery; [4]
- Improperly recording the results of patients' CST and BAT tests in order to justify cataract surgery;
- Falsifying his patients subjective vision complaints in order to justify cataract surgery;
- Falsely recording that his patients had dense cataracts in order to justify cataract surgery;
- Improperly discouraging his patients from getting second opinions regarding the need for cataract surgery; and
- Pressuring patients into having cataract surgery.

[4] Notably, Dr. Morhun, the only doctor whom the State relied upon in summarily suspending Dr. Chase's license, testified at Dr. Chase's criminal trial that since the summary suspension he has purchased and begun using CST equipment in evaluating cataract patients, albeit in a less standardized manner than Dr. Chase used the test.

Finally, the State alleged that Dr. Chase employed all of these unprofessional and fraudulent practices in order to recommend and perform cataract surgery that was not medically necessary. (Superceding Specification of Charges, *passim*.)

In its Specification of Charges, the State reiterated verbatim the sworn allegations contained in Ms. Landry's affidavit as summarized in the Motion to Suspend. (Specification of Charges ¶¶ 26-35.) And when the Superceding Specification of Charges was filed, the allegations attributed to Ms. Landry were again set forth, verbatim, and featured prominently in the State's charging document. (Superceding Specification of Charges ¶¶ 414-423.) Those allegations remain to this day, despite the fact that Ms. Landry has recanted them.

F. Dr. Chase Sought To Interview The State's Witnesses, But The State Expressly Requested Those Witnesses Not To Speak With Dr. Chase's Attorneys Outside The Presence Of The Assistant Attorney General.

Pursuant to the Board's August 7, 2003 discovery order, the State identified the witnesses it intends to call at the hearing in this matter. Those witnesses included former patients and employees of Dr. Chase, as well as area ophthalmologists. Presumably, the State interviewed each of its identified witnesses regarding their likely testimony prior to placing them on the State's witness list. Dr. Chase was not invited to participate in those interviews.

On December 1, 2003, Dr. Chase's attorneys sent a letter to most of the State's identified witnesses, asking them if they would agree to be interviewed by Dr. Chase's defense team. (See December 1, 2003 Letters from Eric S. Miller to Witnesses, attached hereto as Exhibit D.) Immediately upon learning that Dr. Chase was attempting to set up interviews with third-party witnesses, the State sent its own letters to 21 of those same witnesses in an attempt to prevent Dr. Chase's attorneys from privately interviewing them just as the State had previously done. (See December 4, 2003 Letters from Joseph Winn to Witnesses, attached hereto as Exhibit E.) The

State's letters were sent on the official letterhead of the Office of the Attorney General of the State of Vermont and read in part as follows:

> Eric Miller, attorney for Dr. Chase, has sent or will send a letter to you requesting an interview or deposition. ***The State requests that you not speak with anyone from his office in an informal interview.*** The State further requests that you allow us to arrange for the scheduling of any deposition Attorney Miller wishes to take.

(*Id.* (emphasis added).) In short, although the State had interviewed each of its witnesses privately, it explicitly requested that the potential third-party witnesses refuse to be interviewed by Dr. Chase's defense team, or to speak with the defense team at all outside of the context of a formal deposition at which the State could be present. (*Id.*) Furthermore, the State asked that it be able to control the timing of any such depositions.

The State's letter to its witnesses was in direct violation of Vermont Rule of Professional Conduct 3.4(f), which plainly states that "***a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party.***" Vermont Rule of Professional Conduct 3.4(f) (emphasis added). Dr. Chase's attorneys immediately informed the State that it was improper to obstruct their access to third-party witnesses. (See December 11, 2003 letter from Eric S. Miller to Joseph Winn, attached hereto as Exhibit F.) The State ignored Respondent's warning and, on December 18, 2003, sent another set of six identical letters to its remaining witnesses, again requesting that they not speak with Dr. Chase's attorneys outside of the State's presence. (See December 18, 2003 Letters from Joseph Winn to Witnesses, attached hereto as Exhibit G.) In addition, the Board's investigator telephoned at least one of the State's key witnesses, Dr. Vincent DeVita, to reinforce the message set forth in the State's letter, stating, "[W]e consider you a witness for the State of Vermont, and we want to be present if you talk to

anybody else." (Transcript of February 2, 2004 Deposition of Vincent J. DeVita, O.D. ("DeVita Dep."), excerpts of which are attached hereto as Exhibit H, at 123-24.)

The State's letters and telephonic admonitions had their intended effect. Numerous witnesses canceled their interviews with Dr. Chase's lawyers after receiving the State's letter. Predictably, after receiving the State's letter, most witnesses did not even respond to Dr. Chase's request to interview them. The subsequent deposition testimony of Dr. DeVita, who declined to respond to Dr. Chase's request for an informal interview, speaks volumes about the effect of the State's communications on its witnesses:

Q: How many times have you talked to [Board investigator] Mr. Ciotti total?

A: One face-to-face meeting.

Q: Okay. And how many phone calls?

A: Three phone calls. One phone call to set up the meeting, a phone call after the meeting because he said to me, ***If anybody contacts you, another attorney wants to talk to you or anything like that, let me know, because we consider you a witness for the State of Vermont, and we want to be present if you talk to anybody else.*** He told me that over the phone. And then -- I don't know. And maybe that was it. There was probably another phone conversation about something, but very -- nothing. You know, just --

Q: So Phil Ciotti called you to tell you that he didn't want you talking to other attorneys without the State present?

A: Yes.

Q: And did you tell him you'd honor that request?

A: ***Yeah. I mean I -- when the authorities tell me what to do, I do it, unless I have another reason not to do it, I guess.***

Q: Especially when you're being regulated by the authorities, right?

A: Yeah, right. Right.

[...]

Q: Do you recognize that letter [sent by the Assistant Attorney General requesting that you not talk with Dr. Chase's attorneys]?

A: Yes.

[...]

Q: Again, fair to say that you decided to heed the Attorney General's request that you not speak with Attorney Miller or anyone from his office outside of their presence?

A: ***Yeah, I decided to heed this. I thought -- I didn't think of it as an elective thing. I thought it was the right thing to do. I mean it says the State of Vermont. They're telling me this is the right thing to do. That's why I did it.***

(DeVita Dep. at 123-24, 176-77 (emphasis added).)

G. In Sworn Deposition Testimony, Amy Landry Testified That She Did Not Make Many Of The Statements Attributed To Her In Her Affidavit And That She Either Did Not Believe Them To Be True Or Did Not Know Them To Be True.

Effectively prevented from interviewing most of the adverse witnesses outside of the State's presence, Dr. Chase deposed the State's star witness, Amy Landry, on December 22, 2003. The State was represented at the deposition by an Assistant Attorney General. In her deposition, Ms. Landry testified that the Board's investigator had obtained her affidavit under false pretenses, that she did not make many of the most important statements attributed to her in her affidavit, that she had informed the Board's investigator that her affidavit contained falsities and inaccuracies, and that the State based its charges upon the allegations contained in her affidavit even after she informed the investigator that they were false.

1. The Board's Investigator Drafted Ms. Landry's Affidavit For Her During A Private Interview.

At her deposition, Ms. Landry testified that the Board's investigator came to interview her at her home on July 17, 2003. (Transcript of Dec. 22, 2003 Deposition of Amy Landry

("Landry Dep."), excerpts of which are attached hereto as Exhibit I, at 13-14, 32; Landry Aff. at 1.) During the interview, the investigator wrote his notes of the interview on an official Board of Medical Practice affidavit form, which he later asked Ms. Landry to sign. (Landry Dep. at 17-18, 32-33; Landry Aff. at 1-4.) As a result, Ms. Landry's "affidavit" was actually composed by the Board's investigator in the investigator's own handwriting. (Landry Dep. 32-33.)

2. Ms. Landry's Affidavit Materially Misrepresented Her Statements To The Board's Investigator.

In drafting Ms. Landry's affidavit, the Board's investigator materially misrepresented her testimony. In her deposition, Ms. Landry testified that she did not make many of the most serious allegations attributed to her, and that she either did not believe that those falsified statements were true or did not know if they were true.

a. Ms. Landry Did Not State Or Know That Dr. Chase Crafted Records To Force Patients Into Cataract Surgery.

As an initial matter, Ms. Landry specifically denied that she made the fundamental accusation attributed to her in her affidavit—that Dr. Chase had "crafted records to force patients into cataract surgery," (Landry Aff. at 1):

> Q: Did you tell Phil Ciotti that Dr. Chase "crafted records to force patients into cataract surgery"?
>
> A: No.
>
> ....
>
> Q: Is it fair to say that when you talked with Phil Ciotti, you didn't know one way or the other whether or not Dr. Chase had crafted records to force patients into cataract surgery?
>
> A: Right. Yes.

(Landry Dep. at 20-21.)

b. Ms. Landry Had No Knowledge Regarding The Accuracy Of Patient A's Chart, And Did Not Testify That It Was Falsified.

Ms. Landry's Affidavit contains a specific allegation that "Dr. Chase wrote [in the medical chart] that [Patient A] wanted cataracts removed when she did not." (Landry Aff. at 4.) However, at her deposition, Ms. Landry confirmed that she played no role in the treatment of Patient A, was not present for any interactions between Patient A and Dr. Chase, and had no idea whether Patient A had indicated a desire for cataract surgery. (Landry Dep. at 47.) As a result, Ms. Landry did not know, and did not tell the Board's investigator, that Patient A did not want her cataracts removed:

> Q: But you didn't tell Phil Ciotti that Dr. Chase [wrote that]. . . [Patient A] . . . wanted her cataracts removed when she did not, because you couldn't have known that, right?
>
> A: Correct.

(Landry Dep. at 47-48, 49.)

c. Ms. Landry Did Not Allege Or Believe That CST Results Were Recorded On Post-It Paper.

Similarly, Ms. Landry testified that she did not tell Mr. Ciotti that "the results of [patients' CST tests] were recorded on post-it paper," as represented by the State, (Motion ¶ 22; see also Landry Aff. at 2):

> Q: CST with BAT results did not go on Post-It notes?
>
> A: No. No.
>
> Q: And you did not tell Phil Ciotti that CST with BAT results went on Post-It notes?
>
> A: No. No.

(Landry Dep. at 22.)

d. Ms. Landry Did Not State Or Believe That Dr. Chase Placed A "Script" In His Exam Rooms For The Benefit Of His Scribes.

Ms. Landry also directly refuted the State's allegation, set forth in her affidavit and repeated in quotation marks[5] in the State's charging documents, that Dr. Chase had a "'script' on an index card taped to [a] machine in the examination room for the benefit of the 'scribe,'" (Motion ¶ 26; Landry Aff. at 2):

> Q: Did you tell Phil Ciotti that there was a script taped on an index card in the examination room?
>
> A: No. I told him that there was information so that people like myself that did not scribe very much knew the points to put down in the chart when he was talking about cataract surgery to the patients.
>
> Q: Is it accurate to portray that card as a script, in your opinion?
>
> A: No.

(Landry Dep. at 25.)

Ms. Landry further testified that Dr. Chase did not require or request that she create or use the index card. (Landry Dep. at 26.) Rather, the supposed "script" that the State introduced in support of its Motion for Summary Suspension was created by her and written in her own handwriting. (Landry Dep. at 26.) She adopted the practice of using the card in order to ensure that she properly charted all of the important information regarding cataract symptoms, treatment, and informed consent that Dr. Chase properly conveyed to a cataract patient during the course of the examination. (See Landry Dep. at 25-26.) Ms. Landry confirmed that her use of her index card was not remotely improper:

> Q: Did you think that there was anything wrong or unusual or unethical about using this card to help you chart during Dr. Chase's exams?

---

[5] Importantly, in its Motion for Summary Suspension, as well as in both of its Specifications of Charges, the State placed quotation marks around the word "script" in recounting Ms. Landry's purported allegations, thereby representing to the Board that she used this loaded word to describe the card. (See Motion ¶ 26; Specification of Charges ¶ 33; Superceding Specification of Charges ¶ 421.) As demonstrated below, she did not.

A: No.

. . .

Q: Did you think that the charges [against Dr. Chase] as you read them misrepresented the nature of this [index] card?

A: Yes.

(Landry Dep. at 28-29.)

e. Ms. Landry Did Not State That Dr. Chase Gave A "Spiel" To Cataract Patients.

In the same breath that it accused Dr. Chase of using a "script," the State alleged that, after examining his patients, Dr. Chase would "begin what ***Ms. Landry characterizes*** as a 'spiel' concerning the presence of cataracts." (Motion ¶ 25.) As support for this accusation, which is repeated verbatim in the Specification of Charges and the Superceding Specification of Charges, (see Specification of Charges ¶ 32; Superceding Specification of Charges ¶ 420), the State cites to Ms. Landry's affidavit, which also characterizes as a "spiel" the information Dr. Chase presented to cataract patients. (Landry Aff. at 2.) However, in her deposition, Ms. Landry expressly and unequivocally denied characterizing Dr. Chase's presentation as a "spiel":

Q: Did you tell Phil Ciotti that Dr. Chase made a spiel to cataract patients?

A. No. Not my wording.

Q: Is that a word that you use?

A: No.

(Landry Dep. at 23-24.) Moreover, Ms. Landry testified that she saw nothing improper with Dr. Chase's acknowledged practice of providing each cataract patient with a standardized list of the risks and benefits accompanying cataract surgery. (Landry Dep. at 207-08.) Indeed, she testified

that, in her opinion, it would have been problematic if each patient had not received the same general information in this regard. (Landry Dep. at 208.)

3. The Board's Investigator Obtained Ms. Landry's Signature On The Affidavit Through Fraud And Misrepresentation.

At the conclusion of his interview with Ms. Landry, the Board's investigator asked her to read and sign the notes that he had prepared on the Board's affidavit form. (Landry Dep. at 33.) The investigator did not tell Ms. Landry that the document he had created was a sworn statement that could be used as evidence. (Landry Dep. at 34.) Directly to the contrary he told her that it was "just for his note-keeping purposes." (See Landry Dep. at 35.)

Upon reading the affidavit, Ms. Landry informed the Board's investigator that the affidavit did not accurately represent what she had told him in several respects, including its use of the words "crafted" and "script." (Landry Dep. at 33-35.) The investigator did not correct the affidavit or ask Ms. Landry to point out all of the inaccuracies it contained. (Landry Aff. at 35.) Rather, the investigator responded by saying "[t]hat this was his notes and that it was okay, that he was taking down the notes." (Landry Dep. at 34.) The investigator went so far as to tell her "that he was taking down notes as he wrote and that it was okay, that, you know, she didn't have to worry about it being accurate – exactly to [her] wording . . . ." (Landry Dep. at 34.)

4. Although Ms. Landry Again Told The Board's Investigator That Her Affidavit Was Inaccurate, The State Nonetheless Utilized Ms. Landry's Affidavit And Reiterated Her Allegations In Three Pleadings Filed With The Board.

Although the Board's investigator knew that Ms. Landry's affidavit contained material falsehoods, the State nonetheless relied heavily upon it in successfully seeking the summary suspension of Dr. Chase's license. After the Motion for Summary Suspension was granted, and that suspension was widely reported in the press, Ms. Landry again informed the Board's

investigator that "the information [attributed to her] was inaccurate" and that she was "very upset." (Landry Dep. at 29-30.) The investigator responded by simply telling her that "everything was going to be okay." (Landry Dep. at 30.)

Once again the investigator did not ask Ms. Landry which portions of her affidavit were false or make any attempt to correct the misrepresentations contained in the Affidavit or the Motion for Summary Suspension. (Landry Dep. at 31.) Instead, in its July 29, 2003 Specification of Charges, the State reiterated verbatim the fraudulently obtained, falsified accusations attributed to Ms. Landry. (Specification of Charges ¶¶ 26-35.) The State again included the very same false and fraudulently obtained accusations in its December 1, 2003 Superceding Specification of Charges. (Superceding Specification of Charges ¶¶ 414-423.) Although Ms. Landry repudiated the false allegations in her December 22, 2003 deposition testimony, and once again privately informed the State of the many inaccuracies contained in the affidavit (Landry Dep. at 202-03), the State has made absolutely no effort to rectify the fraud perpetrated upon the Board. Rather, two and one-half years later, it continues to rely upon Ms. Landry's falsified affidavit to support the key allegations it has leveled against Dr. Chase. To the Respondent's knowledge, there has been no inquiry into the investigator's actions by the Board and no disciplinary action has been taken against him.

H. The Board Reversed Its Summary Suspension Of Dr. Chase's License In Light Of The Irregularities That Had Occurred During The State's Investigation And Prosecution Of The Case.

On February 17, 2004, Dr. Chase requested that the Board reverse the summary suspension of his license based on the demonstrated falsification of Amy Landry's affidavit and the State's improper efforts to prevent Dr. Chase from interviewing key witnesses. The State did not deny many of the falsifications; rather it attempted to justify them by contending that the

investigator wrote down what Amy Landry really meant to say, rather than what she actually said. Nor did the State deny it had requested that its witnesses not speak with the defense; instead, in direct contravention of the plain language of Rule of Professional Conduct 3.4(f), the State argued that it had acted ethically in requesting that its witnesses not speak to the defense. At oral argument on Dr. Chase's Motion, Assistant Attorney General Winn challenged the Respondent to report him to the Professional Responsibility Board for a determination of whether or not his actions did, in fact, violate the Rules of Professional Conduct governing lawyers.

After considering the parties' evidence and arguments, a majority of the Board "[was] not satisfied that the summary suspension order [was] completely free from the appearance of reliance on questionable material." (March 31, 2004 Order at 3.) As a result, the Board reinstated Dr. Chase's medical license. The Board declined to dismiss the Superceding Specification of Charges, finding that it was not sufficiently tainted by the conduct of the investigator or prosecutor. Indeed, the Board declined to rule as to whether or not the prosecutor violated ethical rules or the Due Process Clause when he requested that witnesses not speak with the defense.

Although his license was reinstated, Dr. Chase agreed that he would refrain from practicing medicine until this proceeding has concluded. Of course, as a practical matter, he no longer had any practice to which he could return.

I. The Vermont Board Of Professional Responsibility Conduct Has Since Ruled That It Is Patently Unethical And Violative Of Due Process To Request Witnesses Not To Speak With An Opposing Party.

Since this Board reinstated Dr. Chase's medical license, the Vermont Board of Professional Responsibility, which regulates lawyers, has ruled that if a prosecutor in an administrative proceeding requests that witnesses not speak with the respondent's counsel, he or

she violates applicable ethical and discovery rules, and unreasonably interferes with the respondent's fundamental right to prepare and defend his own case.

In the case of *In re PRB File No. 2004.208* (Vt. Prof. Resp. Bd. Sept. 27, 2005), a copy of which is attached hereto as Exhibit J, the Professional Responsibility Board considered ethical charges brought against a lawyer prosecuting a case in an administrative proceeding before a licensing board. *Id.* at 1. The prosecutor disclosed his witness list to the licensee's attorney. *Id.* The licensee's attorney wrote to the witnesses, identifying himself as an attorney and requesting an informal meeting. *Id.* In response, the prosecutor sent his witnesses letters, stating: "The State requests that you not speak with [the licensee's attorney] or anyone else from his office in an informal interview." *Id.* at 2. The Professional Responsibility Board was asked to decide whether or not the prosecuting attorney's letter violated Rule 3.4(f) of the Rules of Professional Conduct.

The Professional Responsibility Board ruled that the prosecutor's actions were clearly unethical, stating that Rule 3.4(f) "appears on its face to proscribe the [prosecutor's] conduct." *Id.* at 3. Quoting commentary to Rule 3.4, the Board noted that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like." (*Id.* at 3.) The Board went on to cite state and federal caselaw prohibiting the prosecutor's conduct, finding that interferences with a party's right to interview witnesses "not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel." (*Id.* at 4 (internal quotation omitted).) As a result, the Board concluded:

> Interfering with an opposing party's right to interview adverse witnesses is an unreasonable interference in the right to prepare and defend one's own case. It is a violation of the discovery rules and also of the Rules of Professional Conduct and we find that [the prosecutor's] letters to witnesses requesting that they not speak informally with opposing counsel violates rule 3.4.

Id. at 4-5. Accordingly, the Professional Responsibility Board admonished the prosecutor.

J. Dr. Chase Was Denied The Ability To Examine The Patients Identified In The Superceding Specification Of Charges.

As to each of the patients identified in the Superceding Specification, the State alleges that Dr. Chase recommended or performed cataract surgery that was not medically necessary. In support of each such allegation, the State relies heavily upon a medical examination performed by a second ophthalmologist or optometrist. In each instance, the complaining patient consented to the examination relied upon by the State. In order to counter this evidence, prior to the scheduled merits hearing, Dr. Chase requested each complaining patient to submit to an eye examination by one of Dr. Chase's expert ophthalmologist witnesses. All of the patients refused to be examined—an unsurprising result in light of the fact that the State had earlier requested that the patients not even speak with the defense.

In response, Dr. Chase requested that the Board exclude evidence of any patient witness who declined to provide the defense with the same access to an examination as he or she had afforded the State. On August 13, 2004, the Board denied Dr. Chase's request.

K. Dr. Chase Was Indicted By The Federal Government On The Eve Of His Merits Hearing.

On September 16, 2004, just days before Dr. Chase's merits hearing was to commence and he was to be given his first opportunity to tell his side of the story, the federal government indicted him on 71 counts of committing criminal health care fraud and making false statements in connection with health care programs. The charges in the Indictment concerned Dr. Chase's

treatment of 34 individual cataract patients, many of whom are also complaining witnesses in this case. Like the Superceding Specification of Charges, the federal Indictment alleged, among other things, that Dr. Chase engaged in a pattern of fraudulent conduct in treating his cataract patients, including:

- Improperly administering contrast sensitivity testing ("CST") and brightness acuity testing ("BAT") in order to justify cataract surgery for his patients;
- Improperly relying upon CST and BAT testing, as opposed to more common Snellen vision testing, in order to justify cataract surgery;
- Improperly recording the results of patients' CST and BAT tests in order to justify cataract surgery;
- Falsifying his patients' subjective vision complaints in order to justify cataract surgery;
- Falsely recording that his patients had dense cataracts in order to justify cataract surgery;
- Improperly discouraging his patients from getting second opinions regarding the need for cataract surgery;
- Pressuring patients into having cataract surgery; and
- Recommending and performing cataract surgery that was not medically necessary.

(Indictment, ¶ 21-49.) In short, the Indictment alleged an illegal scheme to defraud that is factually identical to that alleged in the Superceding Specification of Charges.

L. This Board Stayed The Disciplinary Action Pending The Outcome Of The Criminal Case.

In light of the federal Indictment, the Board issued an order postponing further action in this disciplinary action until the criminal case was resolved. The State supported a stay in the event of a federal Indictment, arguing to the Board's hearing officer that resolution of the criminal case, whether for or against Dr. Chase, would aid resolution of this disciplinary proceeding. In its pleadings, the State noted that resolution of the criminal case "would almost certainly aid the Board in resolving this matter efficiently, with minimum burden to witnesses." (Defendant's Memorandum In Opposition to Motion for Stay at 8.) Simply put, both the parties and the Court anticipated that the federal criminal case, whatever its outcome, would render a hearing on the State's charges either unnecessary or vastly streamlined.

M. The United States And The State Of Vermont Investigated And Tried Dr. Chase On 71 Criminal Counts Of Healthcare Fraud And Making False Statements.

The federal criminal case was prosecuted by two Assistant United States Attorneys ("AUSA") and one Vermont State Assistant Attorney General, who was specially designated as an AUSA for the purposes of asserting the State's interests in the prosecution. The government devoted enormous resources to the prosecution of Dr. Chase, staffing its case with scores of federal and state agents from the Federal Bureau of Investigation, the Department of Health and Human Services Office of Inspector General, the Department of Justice, and the Vermont Medicaid Fraud and Abuse Unit, some of whom were flown in from out of state to lend their expertise in investigating and prosecuting health care fraud.

The criminal trial commenced on September 19, 2005 and concluded nearly three months later on December 16, 2005. At trial, the government called 62 witnesses, including more than a dozen medical experts, each of whom testified in detail about cataracts, cataract surgery, medical

recordkeeping, and the proper treatment of cataract patients. The defendant called 31 witnesses, including nine experts. The jury heard from over 40 former patients of Dr. Chase, some of who testified for the government and others for the defense. Approximately 10 former employees of Dr. Chase testified, explaining Dr. Chase's office procedures and his diagnostic, treatment, and recordkeeping practices. The financial cost of the trial to Dr. Chase was also huge. The emotional toll that the trial imposed on Dr. Chase and his family is incalculable.

N. During The Trial, The Government Improperly Withheld Important Exculpatory Information From The Defendant.

After nearly three months of trial in the federal criminal case, the Court discovered that the government had failed to turn over to the defense very important evidence of Dr. Chase's innocence, in violation of constitutional requirements and the Court's prior discovery order. The Government's violation of its constitutional duty took several forms.

First, just as the State alleges here, the government claimed that Dr. Chase's practice of using the BAT only on its highest setting was purposefully calculated to produce fraudulently low vision test scores, was inconsistent with proper clinical practice, and was designed to make it appear as if his patients needed cataract surgery when in fact they did not. After 45 days of trial, it came to light that the government had interviewed Dr. Robert Kennedy, the Chief of Ophthalmology at Ellis Hospital and the ophthalmological chart auditor for MVP, one of the largest health insurers in the state. During that interview, Dr. Kennedy informed the government that when examining his cataract patients, he, too, begins glare testing with the BAT on its highest setting, but unlike Dr. Chase, he gives his patients no time for their eyes to adjust to the light on high. Needless to say, this important information, withheld from the defense until the very end of trial, directly contradicted one of the government's main factual allegations – that the use of the BAT on high had no legitimate clinical purpose.

Moreover, in the criminal case, the government argued, just as the State does here, that Dr. Chase engaged in improper conduct when he re-performed CST and BAT testing on his patients after their eyes were dilated. It was the government's repeated contention that such testing serves no legitimate scientific or medical purpose. However, after 47 days of trial, Dr. Chase and the Court were informed for the first time that the government had withheld important exculpatory evidence on this key allegation: The government failed to turn over a statement of Dr. John Dagianis, a New Hampshire ophthalmologist, who told investigators that "if a patient complaint was problem driving at night, then you possibly may want a CST with BAT done post dilation." This is exactly what Dr. Chase had argued throughout trial. Once again, the government had withheld evidence of Dr. Chase's innocence, despite a constitutional duty to turn it over.

Finally, at the very close of trial, the government revealed that it had also failed to disclose multiple statements from other doctors, former employees, and patients that were favorable to Dr. Chase, and directly contrary to the government's theory of its case. For instance, just as the State is arguing here, the government in the criminal case claimed that Dr. Chase used sticky notes to record patient vision scores in order to falsify patient test results. However, during its criminal investigation, the government interviewed a former technician of Dr. Chase, Ann Hadlock, who explained that the "yellow sticky" practice "was in place in case a tech made a mistake, which was caught by Dr. Chase." She went on to report "that once Dr. Chase checked the results of the examination and their accuracy, they were recorded in the chart and the yellow sticky thrown out." In short, Ms. Hadlock offered a perfectly innocent and entirely sensible explanation for one of the United States' and the State of Vermont's main allegations of wrongdoing by Dr. Chase.

The government had a constitutional obligation to turn over all of this information to the defense, but failed to do so. Due to the government's improper supression, the jury was never given the opportunity to hear piece after piece of evidence favorable to Dr. Chase, including the statements of Dr. Kennedy, Dr. Dagianis, and Ann Hadlock.

O. The Federal Court Concluded That The Government Had Improperly Failed To Disclose Exculpatory Evidence, But Allowed The Jury To Decide The Case.

The Court found that the government's non-disclosure of material exculpatory information was uniquely troubling, and that it called into question any guilty verdict that might later be returned by the jury:

> "***In my view, failure to disclose Dr. Kennedy's observations about . . . using the BAT on high . . . is extraordinarily serious***."

(Excerpts from Transcript of Jury Trial dated December 8, 12 & 13, 2005, attached hereto as Exhibit K ("Dec. 8, 2005 Trial Tr. at 3").)

> ***You know, I don't mean to exaggerate, but this is --- this is a first for me as a judge to all of a sudden, after this many days, have such important information disclosed to the other side. And it is somewhat of a shock, to be perfectly honest.***

(*Id.* at 54-56.)

> I will be honest when I say that I have some concerns about what a verdict would mean at this point. So if there's a guilty verdict, what exactly does it mean in light of the fact that some of this material was not disclosed.

(Dec. 13, 2005 Trial Tr. at 126.)

> This is our system of justice. And . . . does that not bring disrespect to all of us that [the government] would end up arguing facts which may not be true? Or are not complete? Or are not thorough?

(*Id.* at 137.)

> I appreciate the defense wants to go forward to a verdict if I don't dismiss [the case], but I have got a responsibility to the criminal justice system, and is any verdict [of guilt] at this point sufficiently reliable to be worthy of anything?

(*Id.* at 147.)

Referring to the Supreme Court's ruling in *Brady v. Maryland,* which held that the government has a constitutional obligation to disclose all material exculpatory information in its possession to the Defendant, the Court made clear that the government had acted unconstitutionally:

> ***There is no question that these are substantial* Brady *violations. There is not the slightest---I mean, I have got to say, not the slightest question in the world that these are* Brady *violations.***

(*Id.* at 141.)

After nearly declaring a mistrial on its own initiative, the Court allowed the case to go to the jury and reserved decision on the appropriate remedy for the government's "extraordinarily serious," "substantial," and "shock[ing]" *Brady* violations until after the jury's verdict.

P. The Jury Acquitted Dr. Chase, Even Though It Did Not Get A Chance To Hear Important Evidence That Was Favorable To Him.

Even though the jury had been deprived access to important exculpatory information, it acquitted Dr. Chase of all but two of the charges against him, finding that the evidence simply did not support the government's theories. The jury remained undecided on those remaining two charges, which involved a single patient not implicated this action. Just days after the jury's verdict, the government chose to dismiss the two charges on which the jury had hung, with a promise that they would not re-charge Dr. Chase. In short, after a two-year investigation and three-month trial, during which the United States and the State of Vermont brought to bear all available government resources against him, Dr. Chase was entirely exonerated.

Q. Dr. Chase Will Never Reopen His Practice.

Dr. Chase is now 70 years old. He has not practiced ophthalmology for over two and one-half years. His medical practice, to which he devoted his entire adult life, has been forever destroyed. He has been forced to devote his retirement and his retirement savings to defending himself against criminal and civil charges he (and the jury) believes to be baseless. During the pendency of the criminal case, his license to practice medicine expired, and he has not sought to renew it. Regardless of the outcome of these proceedings, Dr. Chase will never again perform surgery or engage in the general practice of ophthalmology, either in Vermont or elsewhere.[6]

R. The State Nonetheless Insists On Pressing Forward With This Disciplinary Action, Which Will Take Well Over A Month Of Hearing Days To Complete.

As noted above, at the time Dr. Chase was indicted, the State told the Board that the result of the criminal trial, whether in favor of the government or the defense, would help resolve this case efficiently. Now that Dr. Chase has been acquitted, however, the State has changed its tune and is insisting on pressing forward with the charges it filed against Dr. Chase over two and one-half years ago, as if nothing had happened in the interim. The State has identified over 34 witnesses that it may call at the merits hearing, including 9 medical experts, 9 former employees, and 14 former patients. Dr. Chase has identified another approximately 20 additional witnesses that he may call in his defense. The testimony to the Board will involve complicated medical and scientific issues. Most of the party's witnesses, including many of their physician and patient witnesses, have already testified before a federal grand jury, at depositions conducted in this case, and during the criminal trial; many of them will therefore be disinclined to voluntarily testify again, particularly in light of Dr. Chase's acquittal. Like the members of this Board, they

[6] Dr. Chase cannot rule out the possibility that after these and other legal proceedings have come to an end, he would seek to perform non-surgical volunteer or missionary work as an examining ophthalmologist or to teach or consult on matters related to ophthalmology. However, if he did so, he would first need to reapply for a medical license from this or another state board.

have jobs to perform and patients to treat. They will rightly ask why they are being forced to retill the same ground again and again.

If the federal criminal case is any guide, the merits hearing in this case will consume hundreds of hours and last well over 30 hearing days, and probably more.[7] Of course, a merits hearing will cost Dr. Chase, the State, the members of the hearing panel, and the taxpayers of Vermont hundreds of thousands of dollars. The burden on all involved, both monetary and otherwise, will be enormous.

Yet the State insists on pressing its case, even though the outcome of this proceeding can have absolutely no positive effect on the safety or efficacy of the health care provided to Vermonters by practicing ophthalmologists. The Board should put an end to this fundamentally flawed, wasteful, and ultimately pointless prosecution and dismiss the charges against Dr. Chase for the reasons set forth below.

III. Discussion.

In light of the irregularities that have marred the Board proceedings to date, the merits hearing in this case can no longer be conducted in a manner that is consistent with due process or the appearance of fairness, as required by the prior rulings of this Board and state and federal courts around the country. Moreover, a merits hearing on the Superceding Specification of Charges can no longer serve the only valid purpose for the Board's regulatory power over physicians: protecting the public. Finally, the continuation of this proceeding promises to waste

[7] As noted above, the federal criminal trial took three months to complete, despite the parties' initial estimate that it would take no more than six weeks. Thus, even if the parties are able to streamline the merits hearing in this matter considerably, it will almost certainly take more than a month. Given the complex nature of the evidence necessary to prosecute and defend this case, the hearing must also take place on more-or-less consecutive days in order for the testimony to remain meaningful to the Board; as a practical matter, it cannot be spread out over a series of weeks or months with significant interruptions.

enormous public and private resources while threatening to diminish the Board's standing and authority in the eyes of the public and the profession it serves.

A. Due Process Demands Dismissal.

1. The Investigator's Falsification Of Evidence Has Infected The Entire Process And Diminished The Board's Authority In This And Other Cases.

Due process requires that the Board dismiss the charges against Dr. Chase. The United States Supreme Court, the Vermont Supreme Court, and other state and federal courts from across the country, have made clear that administrative proceedings such as this are subject to the requirements of the Due Process Clause of the United States Constitution. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Petition of N.E. Tel. & Tel. Co.*, 120 Vt. 181, 188 (1957) ("The essentials of due process permit administrative regulation only by adherence to the fundamental principles of constitutional government."); *Lowe v. Scott*, 959 F.2d 323, 334-35 (1st Cir. 1992); *Colorado State Bd. of Med. Examiners v. Colorado Ct. of App.*, 920 P.2d 807, 812 (Colo. 1996).

Although a respondent in an administrative proceeding is not always guaranteed the full range of protections available to a criminal defendant, a proceeding before an administrative agency is always subject to at least the "***essentials of due process***." *Petition of N.E. Tel. & Tel. Co.*, 120 Vt. at 188 (emphasis added). "The quasi-judicial [administrative] action . . . prescribed [by the due process clause] ***must faithfully observe the 'rudiments of fair play.'***" *Id.* (emphasis added). As one court recently stated, the "***relaxed procedure***" of an administrative proceeding "***is not a license to violate fundamental fairness***." *Nichols v. DeStefano*, 70 P.3d 505, 507 (Colo. Ct. App. 2002); *see also Precious Metals Assoc., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 910 (1st Cir. 1980) (due process mandates that an administrative hearing

be conducted in accordance with fundamental principles of fair play); *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977) ("[T]he due process clause does insure fundamental fairness of the administrative hearing."); *Miklus v. Zoning Board,* 225 A.2d 637, 641 (Conn. 1967) ("[T]he conduct of [an administrative] hearing shall not violate the fundamentals of natural justice."); *Sohi v. Ohio State Dental Board,* 720 N.E.2d 187, 192 (Ohio Ct. App. 1998) ("Procedural due process [in medical license suspension hearing] also embodies the concept of fundamental fairness.").

There is absolutely no question that the right to a proceeding free of evidence falsified by the State is an "essential" of due process, a "rudiment of fair play," central to notions of "fundamental fairness," and therefore fully applicable in an administrative proceeding. In the Supreme Court's words: the "principle that a State may not knowingly use false evidence" is so fundamental as to be "***implicit in any concept of ordered liberty***." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (emphasis added); *see also United States v. Vozzella*, 124 F.3d 389, 392 (2d Cir. 1997) ("The fundamental unfairness of a conviction obtained through the use of false evidence has long been recognized by the Supreme Court."). Although, here, the State appears to have not yet grasped the concept, "***the wrongfulness of charging someone on the basis of deliberately fabricated evidence is . . . obvious***." *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (emphasis added). As these cases demonstrate, no State-initiated deprivation of property rights complies with the Due Process Clause to the extent it is based on falsified evidence.

Through its March 31, 2004 Order reinstating Dr. Chase's license, this Board has already concluded that the investigator's action in falsifying the Landry affidavit called into question the fairness of the summary suspension. However, the Board went on to conclude that "there is not a sufficient connection between the questionable affidavit and the allegations set forth in the

Superceding Specification of Charges to warrant dismissal." (March 31, 2004 Order at 2.) This conclusion is both incorrect and misses the point made by decades of caselaw regarding the falsification of evidence.

First, there is the most direct of connections between the falsified Landry affidavit and the Superceding Specification of Charges: The Specification quotes the falsified portions of the affidavit verbatim and at length. (Superceding Specification of Charges ¶¶ 414-423.) Thus, the State explicitly relies on the falsified evidence. Remarkably, almost two years after this Board indicated a lack of confidence in the Landry affidavit, the State has not bothered to renounce it. The Specification continues to be infected by the investigator's falsifications.

Second, the Board cannot ignore that it was the investigator's falsification of the Landry affidavit that led directly to the summary suspension of Dr. Chase's medical license---a suspension that was temporary in name only and which forever destroyed Dr. Chase's practice, before he had any opportunity to discover, much less attempt to remedy, the falsification. Once the summary suspension was handed down and featured prominently on the front page of the Vermont newspapers, Dr. Chase would never practice again. The investigator, the State, and the Board understood that to be true when the summary suspension was issued. To conclude that the falsification is not sufficiently linked to the pending disciplinary action is to turn a blind eye to the career-ending damage done by the investigator acting under the Board's auspices.

Third, as the United States Supreme Court has held, the falsification of evidence in a judicial or disciplinary proceeding is so fundamental as to threaten the concept of ordered liberty. Put differently, the system just doesn't work if any party, public or private, is allowed to purposefully alter evidence and mislead the tribunal. If the Board chooses to tolerate the demonstrated falsification of evidence by its own investigator, particularly once that evidence

has been used to end a doctor's career, the very integrity of the Board and its processes will be irreparably harmed, whether or not the falsified evidence is ultimately used at the merits hearing. The United States District Court recognized this very concept when it took the government to task for improperly withholding material exculpatory evidence in Dr. Chase's criminal case, rhetorically asking: "[D]oes that not bring disrespect to all of us that [the government] would end up arguing facts which may not be true? Or are not complete? Or are not thorough?" (*See* Ex. K, Dec. 13, 2005 Trial Tr. at 137.) If, as the federal court found, the suppression of exculpatory evidence impugns the integrity of the justice system, the falsification of inculpatory evidence does so all the more. The same investigator who falsified the Landry affidavit was responsible for building most of the remainder of the State's case. To allow the State to move forward with that case, particularly after it has failed to renounce reliance on the falsified information, makes a mockery of the system.

2. The Prosecutor's Ethical Violations Compounded The Due Process Violations By Making It Even More Difficult For The Respondent To Prepare His Case.

Similarly, the right to seek private interviews with relevant witnesses without interference by the State is an essential component of due process and an element of fundamental fairness, and is therefore fully applicable in an administrative proceeding. "**[E]*lemental fairness and due process require***[] that" a defendant be allowed an opportunity to interview State witnesses without interference by the State. *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966); *cf. United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974) (notion that government cannot place witnesses beyond reach of defense is "to prevent basic unfairness"). This principle is a "dictate" of "notions of fair play and due process." *Coppolino v. Helpern*, 266 F. Supp. 930, 935 (S.D.N.Y. 1967).

When it last considered the prosecutor's efforts to prevent the Respondent from talking with witnesses outside the State's presence, the Board avoided making any finding on whether those efforts constituted either ethical or constitutional violations. In light of the Vermont Professional Responsibility Board's intervening ruling in *In re: PRB File No. 2004.208*, this Board can no longer avoid these issues or their implications.

As the Professional Responsibility Board cogently wrote, restrictions on a party's ability to interview witnesses "'not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made.'" *In re: PRB File NO. 2004.208* at 4 (Vt. Prof. Resp. Bd. Sept. 27, 2005) (*quoting IBM v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975)). ***"Interfering with an opposing party's right to interview adverse witnesses is an unreasonable interference with the right to prepare and defend one's own case."*** *Id.* at 4. As noted above, the right to prepare and defend one's own case is precisely the fundamental right that is guaranteed by the Due Process Clause of the United States Constitution. Thus, to allow the prosecution of Dr. Chase to continue under these circumstances would be, in a word, unconstitutional.

It would also demonstrate tolerance for unethical action on the part of the prosecutor acting on the Board's behalf. The Board must decide whether it condones its own prosecutor acting unethically and unconstitutionally toward the Respondent. If the answer is "no," there must be some consequence. At this point, dismissal is the best and only sanction available.

In assessing the harm done to Dr. Chase's due process rights by the actions of the investigator and the prosecutor, the Board cannot view either misdeed in isolation. The

investigator's actions vividly demonstrate that he is capable of fabricating evidence against Dr. Chase and attempting to turn witnesses against him. The only way that Dr. Chase can begin to ferret out which of the supposed witness statements are true and which are not is by interviewing the witnesses themselves, without the prosecutor sitting by the witnesses' sides, as he did at every single deposition. The prosecutor's illegal letters to its witnesses prevented those interviews from occurring.

Those letters also reinforced in each recipient's mind that he or she was a "State witness," aligned with the prosecutor against Dr. Chase, whose lawyers could not be trusted to fairly conduct interviews without the State present. When the State tells a witness something, particularly when it tells them in writing on the Attorney General's official letterhead, the witness listens. There is nothing Dr. Chase can ever do in order to overcome the "us versus them" mentality that the State has purposefully ingrained into its witnesses minds. This fact became evident when patient after patient refused to grant Dr. Chase the same access to medical records and the same ability to conduct eye examinations as they afforded the State, further compromising Dr. Chase's right to build his defense.

B. The Board Must Dismiss This Case In The Interests Of Justice And To Serve The Appearance Of Justice.

In its Order reinstating Dr. Chase's license, this Board recognized that it absolutely must "ensure that its procedures are carried out without even the appearance of questionable standards and its actions have the complete faith and confidence of the public as well as the individuals who come before the Board." (March 31, 2004 Order at 3.) In so ruling, the Board placed itself within a long line of state and federal caselaw which holds that an adjudicative body can and must dismiss charges to make certain that the interests of justice are served. As one court recently held, an adjudicative body "has inherent power to fashion remedies in the interest of

justice, which may include dismissal of an indictment for reasons of fundamental fairness even in circumstances where a defendant's constitutional rights are not implicated." *State v. Ruffin*, 853 A.2d 311, 320 (N.J. Super. 2004). The power of a tribunal to dismiss a case in the interest of justice is "inherent" and "has ancient roots." *State v. Rickert*, 58 N.Y.2d 122 (1983). Without that power, or where a board fails to exercise that power where justice demands, the board's moral and legal authority to regulate conduct is greatly diminished or destroyed.

Neither justice nor the appearance of justice will be served if this prosecution is allowed to continue. As discussed above, the proceedings have already been badly marred by the conduct of the Board's investigator and its prosecutor. The summary suspension, while ultimately overturned due to the investigator's conduct, permanently ended Dr. Chase's 35-year career, causing untold financial and personal damage. Nothing this Board does in the future can fully remedy that harm. Nor can it impose discipline that, in practical terms, is worse than the professional death sentence it has already administered to Dr. Chase. Moreover, as a result of the investigative and prosecutorial misconduct, Dr. Chase has not had an opportunity to interview outside of the State's presence the vast majority of witnesses that will be called to testify against him. Those witnesses have refused to undergo eye exams by Dr. Chase's experts, leaving Dr. Chase with a badly compromised ability to defend himself.

Since this action was stayed in September 2004, the intervening events have called into even greater question the justness of prosecuting Dr. Chase administratively. The federal and State governments charged Dr. Chase with 71 counts of criminal conduct that were factually identical to the administrative charges the State asserts here. The United States and the State of Vermont threw every available resource at Dr. Chase, investigating him for two years with scores of agents and trying its case to a jury for three full months with three experienced state

and federal prosecutors. During that trial, the government was found by the United States District Court to have withheld important evidence of Dr. Chase's innocence, in violation of its constitutional obligations. Despite the government's suppression of this exculpatory evidence, which the jury never heard, Dr. Chase was acquitted of 69 of the 71 charges against him. The government wisely moved to dismiss the remaining two charges, leaving Dr. Chase completely exonerated. Nonetheless, the entire experience cost Dr. Chase his career, over two years of his life, and hundreds and hundreds of thousands of dollars in defense costs. There can be little doubt that justice was ill-served by the misguided criminal prosecution of Dr. Chase. That injustice, and the appearance of injustice, will only be compounded and perpetuated by the continued prosecution of Dr. Chase in these administrative proceedings.

C. The Disciplinary Proceedings Can No Longer Serve Any Legitimate Purpose.

As this Board recognized in its Order reversing Dr. Chase's summary suspension, "[t]he Board's regulatory authority over physicians '. . . is solely for the purpose of protecting the public.'" (3/31/04 Order at 3 (quoting 26 V.S.A. § 3101).) Any Board actions that do not serve that goal go beyond the scope of the limited statutory purpose of the Board as defined by the legislature. Because Dr. Chase no longer has a license to practice medicine, is not reapplying for a license, and has already suffered the equivalent of a professional death sentence at the hands of this Board, that purpose can no longer be served through continued disciplinary proceedings. Indeed, the only practical result of these proceedings, regardless of the outcome, will be to needlessly expend massive amounts of scarce State resources and taxpayer dollars and to further burden Dr. Chase with the enormous monetary and emotional costs of defending, once again, his legitimate diagnostic and treatment practices.

During the pendency of this case, Dr. Chase's medical license expired, and he has no plans to reapply for a license. Nor could he practice general ophthalmology again if he did. For the foreseeable future, Dr. Chase will be spending his time fighting off the host of civil lawsuits that have sprung up in the wake of the highly publicized summary suspension of his license. In short, if the public needs protecting from Dr. Chase (and it does not), that goal has been entirely accomplished. There is nothing more this Board can do to further it.

Even if, when his legal fights are behind him, Dr. Chase still wants to be involved in ophthalmology in some way, it would only be to do volunteer or missionary treatment of underprivileged patients under the auspices of an organization that performs such work, or to teach or consult with other practicing ophthalmologists. He will never again perform surgery, cataract or otherwise. Even if every one of the State's allegations, all of which deal with Dr. Chase's surgical decisions and practices, were correct, they would not call into question his competence to perform that sort of work. And this Board would have an opportunity to again review his qualifications, through a licensing proceeding, before he could take even the limited step of offering his examination skills to underprivileged patients.

It is against this backdrop that the State wants to proceed with a hearing that will take more than a month---more than a month of this Board's precious time, more than a month of taxpayer dollars used to pay prosecutors and investigators, and more than a month of private attorneys fees, which will quickly run into the hundreds of thousands of dollars. The result will then almost certainly be appealed by the losing side, delaying the conclusion for another year or more and resulting in the additional expenditure of resources by all. The improper and unethical actions of the Board's investigator and prosecutor will almost certainly spawn separate litigation.

Regardless of who ultimately prevails, the result will be no different from that which exists today: Dr. Chase will not reopen his practice.

Finally, to the extent the Board's power to protect the public includes the ability to punish past alleged wrongdoing by physicians in order to deter future bad conduct and thereby protect the public, *see Perry v. Medical Practice Board,* 169 Vt. 399, 403 (1999), that goal, too, has already been served and cannot be furthered by continued prosecution. Additional disciplinary action by the Board would not serve to make an example of Dr. Chase in order to deter others. Dr. Chase has already paid the ultimate professional and personal price at this Board's hands, a price that has been noted by practitioners and the public alike.[8]

This Board was exactly correct when it previously ruled that its sole purpose was to protect the public. Nothing it can now do will further that goal. Continued proceedings would therefore exceed the Board's limited purpose, and the charges must be dismissed for this reason as well.

D. The Board Could Dismiss This Case Without Prejudice To Considering Charges Against Dr. Chase Should He Reapply For A Medical License In The Future.

Dr. Chase requests that the Board dismiss the charges against him with prejudice—that is, the State should not be able to re-bring these charges at a later date. As discussed above, Dr. Chase poses no threat to the safety of Vermonters and never will. However, if the Board were nonetheless concerned that Dr. Chase might reapply for a license in the future, it could dismiss the State's charges without prejudice, thereby allowing the State to re-charge him if he decided to reapply for a medical license, either in Vermont or elsewhere. Of course, if Dr. Chase made such an application, the State could oppose licensure on the same grounds set forth in the

[8] As a result, the facts of this case are easily distinguishable from *Perry*, where the practitioner attempted to withdraw his allegedly falsified license application before the Board completed its investigation or took any disciplinary action against him.

Superceding Specification, even without commencing another disciplinary action. *Vermont Board of Medical Practice Rule 3.4* (reinstatement may be denied on grounds of unprofessional conduct as set forth under Vermont law). Through dismissal without prejudice, the Board could preserve the State's ability to air its charges against Dr. Chase if, at some point in the future, the public safety were allegedly threatened and there were actually something to be gained through a disciplinary proceeding. At this time, however, there is not: The only result of moving forward with the charges will be to needlessly expend enormous public and private resources, including the valuable time of this Board, in order to arrive at a verdict, either for or against Dr. Chase, that will have no practical effect on the only thing that ultimately matters to this Board, the safety of the public. Consequently, at the very least, dismissal without prejudice is appropriate.

IV. Conclusion.

For the reasons discussed above, Dr. Chase respectfully requests that the Board dismiss the Superceding Specification of Charges with prejudice. In the alternative, he requests that the Board dismiss the Charges without prejudice to the State re-bringing those charges if Dr. Chase reapplies for a medical license, either here or elsewhere.

Dated at Burlington, Vermont, this 8th day of February, 2006.

SHEEHEY FURLONG & BEHM P.C.
Attorneys for DAVID S. CHASE, M.D.

By: _____

Eric S. Miller
R. Jeffrey Behm
30 Main Street
P.O. Box 66
Burlington, VT 05402
(802) 864-9891

F:\WPDOCS\C\ChaseDavidMD\MedPrBd\Pleadings\Renewed Motion to Dismiss 03.doc